

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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SALLY D. VILLAVERDE,

Case No. 3:10-cv-00347-MMD-WGC

Petitioner.

ORDER

v.

GREG SMITH, *et al.*

Respondents.

14 This represented habeas action comes before the Court on: (a) a pending show-
15 cause inquiry (dkt. no. 31); (b) an unopposed motion to dismiss by respondents (dkt. no.
16 35); (c) two unopposed motions to strike intervening amended petitions by respondents
17 (dkt. nos. 38 & 42); and (d) a motion for leave to file a third amended petition by
18 petitioner (dkt. no. 43), which is opposed by respondents.

I. BACKGROUND

20 A number of response deadlines have passed in this matter, both deadlines for
21 particular action following an order and deadlines for responding to particular motions.
22 The Court therefore details the relevant procedural history below.¹

23 By a screening order (dkt. no. 31) entered on April 16, 2013, the Court, *inter alia*,
24 directed petitioner to show cause why Grounds 3 and 4 in the counseled amended
25 petition (dkt. no. 29) should not be dismissed on a number of bases particular to each

26 1The last filing in this matter prior to this order was a notice of hospitalization of
27 petitioner's counsel. Ms. Wilson since has been filing papers in other matters, and the
28 Court trusts that counsel has returned to good health. The referenced hospitalization
postdates the expiration of the deadlines discussed herein.

1 ground. In an effort to move the case to a prompt resolution, the order further
2 established a deadline for respondents to file a motion to dismiss if they wished to raise
3 additional procedural defenses. The order set deadlines for petitioner to respond to the
4 show-cause order and to any motion to dismiss filed. The order further set a deadline
5 for petitioner to file any motion to stay, with the proviso that any request for a stay must
6 be presented by a separate stand-alone motion. The order stated: **"If petitioner does
7 not timely file a separate motion to stay in compliance with this order, any other
8 noncompliant request for a stay embedded in other filings will be disregarded
9 and the issue will have been defaulted by petitioner."** (Dkt. no. 31, at 6 (bold
10 emphasis in original.))

11 On May 7, 2013, respondents filed a motion to dismiss (dkt. no. 35) seeking the
12 dismissal additionally of a portion of Ground 1 as unexhausted and meritless.

13 On May 15, 2013, the Clerk received and filed a *pro se* second amended petition
14 (dkt. no. 37) submitted in proper person by the represented petitioner.

15 On May 20, 2013, respondents filed a motion to strike the second amended
16 petition (dkt. no. 38).

17 No opposition was filed to the motion to strike.

18 On June 13, 2013, petitioner, through counsel, filed a motion for an extension of
19 time to respond to the show-cause order and motion to dismiss (dkt. no. 39). The
20 motion was filed within the time period established by the order for such responses.

21 On June 14, 2013, the Court granted the motion extending the time to respond to
22 the show-cause order and the motion to dismiss until July 15, 2013 (dkt. no. 40).

23 On July 15, 2013, petitioner filed a counseled third amended petition (dkt. no.
24 41). The amended petition was not accompanied by a motion for leave to amend. The
25 Court's prior orders had neither directed the filing of the amended petition nor granted
26 leave for petitioner to do so.

27 Petitioner did not respond to either the show-cause order or the pending motion
28 to dismiss by the July 15, 2013, deadline. Petitioner filed no separate motion for a stay

1 with regard to any unexhausted claims by the deadline. Petitioner filed no motion
2 seeking an extension of the applicable deadlines, whether pending any other
3 determination or otherwise.

4 On July 24, 2013, respondents filed a motion to strike the third amended petition
5 (dkt. no. 42).

6 No opposition was filed to the motion to strike.

7 On August 20, 2013, petitioner filed a counseled motion for leave to file a
8 pleading styled as a third amended petition (dkt. no. 43). Petitioner did not attach a
9 separate pleading with the motion. The motion instead incorporated the pleading within
10 the motion. It appears that counsel added the words "motion for leave to file" to the title
11 of the prior pleading (dkt. no. 41) and added an introductory motion paragraph. The
12 remainder of the paper appears to be from the prior pleading, without even a motion
13 prayer added at the end.

14 Respondents have opposed the motion for leave on, *inter alia*, the ground that
15 petitioner failed to comply with the requirement of the local rules that a motion for leave
16 to amend must submit a separate, stand-alone proposed pleading.

17 **II. DISCUSSION**

18 Petitioner has not opposed the motions (dkt. nos. 38 and 42) to strike the second
19 and third amended petitions (dkt. nos. 37 and 41). Those motions therefore will be
20 granted and the pleadings will be stricken. Petitioner may not file pleadings in proper
21 person while represented by counsel. Moreover, as to both pleadings, petitioner could
22 not simply file a pleading in the procedural posture presented without leave of Court.
23 See Fed. R. Civ. Pro. 15(a); Rule 12 of the Rules Governing Section 2254 Cases.

24 The motion (dkt. no. 43) for leave to file a third amended petition will be denied
25 on the papers presented.

26 First, Local Rule LR 15-1(a) requires, *inter alia*, that "the moving party shall
27 attach the proposed amended pleading to any motion to amend, so that it will be
28 complete in itself without reference to the superceding pleading." Petitioner did not

1 comply with the rule. Petitioner asserts that "a motion for leave was filed and the third
2 amended petition [was] attached." (Dkt. no. 45, at 3.) That is not what the record reflects
3 that petitioner did. Petitioner provides no other argument regarding the noncompliance
4 with the rule.

5 Second, a litigant does not have an unfettered right to unilaterally amend the
6 pleadings after the time for amending the pleadings has expired under the scheduling
7 order for a case. The directive under Rule 15(a)(2) that leave to amend should be freely
8 given when justice so requires does not carry the same force where the court already
9 has allowed amendment of the pleadings and the deadline for doing so under the
10 court's scheduling order has expired. See, e.g., *Miller v. Yokohama Tire Corp.*, 358 F.3d
11 616, 622 (9th Cir. 2004) (where the party previously has filed an amended pleading, the
12 district court's discretion to deny further leave to amend is particularly broad); *cf. In re*
13 *Western States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d 716, 737 (9th Cir.
14 2013) (in a case governed by a Rule 16 scheduling order, the party seeking leave must
15 show good cause, including that the party was diligent in presenting the added claims
16 for the first time in the amended pleading); see also *Davis v. Navarro*, 2010 WL 246905
17 (9th Cir. June 17, 2010) (unpublished; application to *pro se* inmate litigant); *Goldyn v.*
18 *Clark County*, 2009 WL 2905983 (9th Cir. Sept. 11, 2009) (unpublished; represented
19 inmate litigant).

20 In the present case, the Court granted the Federal Public Defender's motion to
21 withdraw and appointed the panel attorney on June 7, 2011. The Court set a one
22 hundred and fifty (150) day deadline to file a counseled amended petition, through
23 November 7, 2011. The Court thereafter granted four extensions of time, extending the
24 deadline through the May 4, 2012, filing of the first amended petition (dkt. no. 29). Over
25 a year later, on May 15, 2013, petitioner filed his *pro se* second amended petition
26 without leave. Counsel thereafter filed a counseled amended petition, also without
27 leave, on July 15, 2013. While the Court makes no definitive resolution of the issue
28 given the defective papers presented, it has substantial doubts as to whether petitioner

1 has demonstrated diligence and good cause for an amendment at this late juncture in
 2 the case. Merely because petitioner in proper person wished to present different claims
 3 after the Court ordered petitioner to file a verification of the first amended petition does
 4 not establish good cause or diligence. The Court was directing petitioner to comply with
 5 a clearly established requirement that should have been complied with, with any
 6 associated consultation between petitioner and counsel, in the first instance prior to May
 7 2012 and without any order from this Court.²

8 Third, the fact that the present matter is a habeas matter is one that generally
 9 cuts against rather than in favor of further pleading amendments late in the case. A
 10 habeas action presents a collateral challenge to a presumptively valid state court
 11 judgment of conviction, in which the petitioner has the burden of timely and effectively
 12 challenging the otherwise final judgment. Presenting serial pleadings amendments late
 13 in the case cuts into the reviewing court's ability to resolve the challenge to the finality of
 14 the state criminal judgment as promptly as its docket otherwise allows. Moreover,
 15 habeas claims are subject to timeliness, exhaustion, and procedural default rules that

16 ²As the record stands now, petitioner filed a verification of the first amended
 17 petition on April 22, 2013, by counsel acting on petitioner's behalf pursuant to 28 U.S.C.
 18 § 2242. Petitioner suggests that the first amended petition is not legitimate because, at
 19 some later point, petitioner allegedly refused to verify the pleading. Dkt. no. 45, at 2-3.
 20 What the record instead reflects is that: (a) the Court ordered the deficiency corrected
 21 on April 15, 2013; (b) petitioner apparently corrected the deficiency on April 22, 2013;
 22 (c) respondents thereupon filed a motion to dismiss per the scheduling order; and (d)
 23 thereafter petitioner started unilaterally filing *pro se* and counseled amended petitions
 24 without leave of court. Petitioner suggests that an amendment must be allowed to
 25 replace the purportedly illegitimate first amended petition. That is not necessarily the
 26 result that will follow if petitioner *arguendo* failed to properly amend the petition by the
 27 deadline in 2012.

28 Petitioner further suggests that an amendment is in some sense required
 29 because, while the Court "desire[d] to have been presented a briefer petition," petitioner
 30 "felt he must have each claim that had been previously presented" to the state supreme
 31 court to satisfy federal habeas pleading specificity rules. Dkt. no. 45, at 9. Petitioner
 32 points to no order by the Court limiting the claims or the number of claims that petitioner
 33 could raise in the first amended petition. There is no general practice in this Court
 34 restricting the size of a counseled amended petition in a habeas case to the 31 pages
 35 contained in the first amended petition in this case. Cf. *Bergna v. Benedetti*, Case No.
 36 3:10-cv-00389-RCJ-WGC, dkt. no. 13 (137 page counseled amended petition). The
 37 time for petitioner to specifically plead the claims that he wanted to raise — under the
 38 same pleading standard in force in May 2012 — was in the first amended petition by the
 39 May 2012 deadline.

1 do not apply in the same manner in general civil litigation. Even if the original petition
 2 was timely under the one-year limitation period, new claims in an amended petition will
 3 be timely only if they relate back to a timely claim in the prior pleading that would be
 4 amended. This Court accordingly does not grant leave to amend a habeas petition after
 5 the deadline for doing so has expired unless the petitioner affirmatively demonstrates —
 6 at the outset within the motion for leave — that the amendment would not be futile given
 7 issues of timeliness, relation back, exhaustion, and procedural default. See *Foman v.*
 8 *Davis*, 371 U.S. 178 (1962) (futility of amendment); *Simpson v. Evans*, 2013 WL
 9 1789789, slip op. at **2 (9th Cir. Apr. 29, 2013) (unpublished; applying rule in habeas
 10 case).

11 The motion for leave to amend therefore will be denied on the papers presented.

12 Turning to the remaining pending matters in the case, petitioner did not respond
 13 to either the show-cause order or the motion to dismiss by the extended deadline of July
 14 15, 2013. As noted, petitioner did not seek any extension of the deadlines pending any
 15 other determination. The represented petitioner simply did not respond.³ The grounds in
 16 the extant amended petition (dkt. no. 29) that were identified to be, *inter alia*,
 17 unexhausted therefore must be voluntarily dismissed by petitioner or the entire petition,
 18 as amended, instead must be dismissed for lack of complete exhaustion. Under the
 19 procedural history summarized *supra*, petitioner has defaulted any request for a stay to
 20 exhaust the claims in the state courts.

21 Finally, petitioner's counsel shall stop filing a duplicate set of exhibits with each
 22 amended petition tendered. If petitioner filed the same exhibits with a prior pleading that
 23 still is on file, there is no need to keep cluttering the record with the same material.
 24 Counsel should attach only any additional exhibits not attached with the prior pleading,
 25 numbered in sequence after the prior exhibit numbers. Moreover, if the respondents

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 28 ³Counsel's unilateral supposition that the third amended petition — filed without a motion for leave to amend — mooted the show-cause inquiry and the motion to dismiss provided no viable basis for not responding to the show-cause order and motion to dismiss by the deadline.

1 filed the exhibit in question previously in this case — see dkt. nos. 23-24 — there is no
2 need to file another copy of the same exhibit with an amended pleading. Both this Court
3 and reviewing courts are looking only for a single set of indexed state court record
4 exhibits relevant to the issues presented in the case, with only such exhibit filings as
5 thereafter are necessary to supplement the existing set of exhibits. Except to any extent
6 that respondents' filing in dkt. nos. 23-24 does not contain a particular exhibit in
7 question, the Court will be referring to those indexed exhibits when reviewing state court
8 record materials herein. Thus, if respondents have filed the relevant exhibits in those
9 approaching 3000 pages of material, the Court does not need any more copies of the
10 same material cluttering the record. Further, both petitioner and respondents — in all
11 filings — should cite to the exhibit numbers in the respondents' exhibit filing in dkt. nos.
12 23-24, unless the exhibit is not included therein.

13 **III. CONCLUSION**

14 It is therefore ordered that petitioner's motion for leave to file a third amended
15 petition (dkt. no. 43) is denied on the papers presented.

16 It is further ordered that respondents' motions to strike (dkt. nos. 38 & 42) are
17 granted and that dkt. nos. 37 and 41 shall be stricken.

18 It is further ordered that respondents' motion to dismiss (dkt. no. 35) is granted in
19 part to the extent consistent with the remaining provisions of this order.

20 It is further ordered, following upon the motion to dismiss and the prior show-
21 cause order, that the Court holds that the following claims in the amended petition (dkt.
22 no. 29) are not exhausted: (a) Ground 1 to the extent that the ground alleges that
23 Teresa Gamboa's testimony was unreliable because it was presented at a preliminary
24 hearing rather than at trial with the higher burden of proof applicable at trial; and (b)
25 Grounds 3 and 4.

26 It is further ordered that petitioner shall have thirty (30) days from entry of this
27 order within which to file a motion for dismissal without prejudice of the entire petition or
28 for partial dismissal only of the unexhausted claims, which shall be expressly referred to

1 as specified in the subparagraphs (a) through (b) of the preceding paragraph above
2 verbatim. Any motion filed must contain or be accompanied by, either
3 contemporaneously or via a document filed within ten (10) days thereafter, a signed
4 declaration by petitioner in proper person under penalty of perjury pursuant to 28 U.S.C.
5 § 1746 that he has conferred with his counsel in this matter regarding his options, that
6 he has read the motion, and that he has authorized that the relief sought therein be
7 requested from the Court. The entire petition will be dismissed without prejudice for lack
8 of complete exhaustion if a motion and/or the verification is not timely filed.

9 It is further ordered that the standard response and reply times under Local Rule
10 LR 7-2 shall apply to any such motion filed, except that the response time shall run from
11 the filing of the verification rather than the motion itself.

12 DATED THIS 14th day of March 2014.
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16 MIRANDA M. DU
17 UNITED STATES DISTRICT JUDGE
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